TABLE OF CASES CITED

PAGE

Aetna Insurance Company v. Hallock, 6 Wall. 556, 18 L. Ed. 948 7

Boswell v. Ohio, 9 How. 336, 13 L. Ed. 164 16

Coffey v. U. S., 117 U. S. 233, 6 S. Ct. 717, 29 L. Ed. 890 ..... 6, 8

Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931..... 16

Dwight v. Merritte, 4 Fed. 614 ..... 7, 14

Ely v. Gamble, 75 Fed. (2) 171 19

First National Bank of St. Louis v. State of Missouri, 263 U. S. 640, 659, 44 S. Ct. 213, 215, 216 11

Hot Springs Co. v. Schreck, 131 Va. 581 18

In Re Condemnation Suit, 234 Fed. 443 16

Johnson v. Haley, Fed. Cases 7389 14

Middleton Paper Company v. Rockriver Paper Co., 19 Fed. 252 ..... 7, 15

Peaslee v. Haberstro, Fed. Cases 10884, 15 Blatchf. 472 13

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 17

U. S. v. Boat Harbor Ry. Company, Inc., 58 Fed (2) 366 8

U. S. v. Mitchell, 223 Fed. 805 15

U. S. v. Fifty Boxes, etc., Lace, 92 Fed. 601 8

U. S. v. Moore, 287 Fed. 879; 294 Fed. 852; 34 S. Ct. 331, 68 L. Ed. 860 8

U. S. v. Southern Dredging Company, 251 Fed. 400 9

TABLE OF STATUTES CITED

PAGE

Revised Statutes U. S. Section 911 (Title 28, U. S. C. A., Section 721) 9, 10, 12, 17

Revised Statutes U. S. Section 914 ..... 6, 10

Revised Statutes U. S. Section 5151 11

Revised Statutes U. S. Section 5220 11

Title 28, U. S. C. A., Section 503 ..... 12, 17, 19

Title 12, U. S. C. A., Sections 63 and 64 ..... 6, 9, 10

Section 240, Acts of February 13, 1925 (Judicial Code) 2

RULES OF COURT CITED

PAGE

Rule 14, U. S. District Court, E. D. Va. 7

TABLE OF TEXT BOOKS CITED

PAGE

Hughes' Federal Practice, 2 Ed., page 137 17

Hughes' Federal Practice and Procedure, 6th Ed., Sec. 3584 18

Rose's Code, Vol. 1, 901 12

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 828

L. P. CHISHOLM,
WALLER HOLLADAY,
W. EARL CRANK,
T. S. WINSTON AND
W. R. DUNKUM, Petitioners.

v.

W. B. GILMER, RECEIVER FOR THE FIRST NATIONAL BANK OF LOUISA, LOUISA, VIRGINIA, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON AND W. R. DUNKUM.

OPINION BELOW.

The opinion of the District Court for the Eastern District of Virginia is set out in the Record at pages 52-56. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 81 F. (2d) 120, and is set out in the Record at pages 61-69.

JURISDICTION.

The order below was entered on the 6th day of January, 1936. Petition for Writ of Certiorari was filed on the day of and was granted on the 13th day of April, 1936. The jurisdiction of this Court rests on section 240 (a) of the Judicial Code as Amended by the Act of February 13, 1925 (U. S. C., Title 28, § 347a).

QUESTIONS PRESENTED.

Whether under the conformity act the District Court had jurisdiction to entertain the proceeding instituted by a notice of motion to recover a double assessment from the stockholders of a National Bank, there being no like case in the State Courts.

Whether a notice of motion is process and must be issued under the seal of the Court and bear the teste of the Judge.

STATEMENT.

This case was instituted on May 12, 1934, by a notice of motion filed in the United States District Court for the Eastern District of Virginia, sitting at Richmond, by W. B. Gilmer, Receiver for the First National Bank of Louisa, Virginia, Respondent, to recover $22,000.00 with interest from January 22, 1934, against your petitioners and Charles L. Perkins, W. Worth Smith, Jr., P. B. Porter, Hunter P. Porter, Administrator of H. W. Porter, deceased, J. F. Bickers, Sheriff, Administrator of U. M. Gentry, deceased, and J. P. Donnally in his own right and as Trustee, as an assessment alleged to have been made by the Comptroller of the Currency of the United States on 220 shares of the capital stock of the insolvent First National Bank of Louisa, Virginia, of the par value of $100.00 a share, alleged to have been purchased by them

after having formed a special combination of themselves to buy said stock for profit, as alleged adventurers and owners thereof, and alleging that they were joint and severally liable for such assessment on said stock registered on the books of the bank in the name of J. P. Donnally as Trustee for L. P. Chisholm and others. The judgment was asked against the nine living defendants and the two administrators of the above named decedents (R. 2-3).

PLEAS IN ABATEMENT AND MOTION TO DISMISS AND DEMURRERS.

Pleas in abatement and motions to dismiss the notice of motion for judgment on the ground that it was void and of no effect and that no such action could be maintained in the United States District Court by a notice of motion merely signed and issued by respondent and not under the seal of the Court, nor signed by the clerk, and not bearing the teste of the District Judge (R. 5-8), and that the District Court was without jurisdiction to entertain such proceedings were filed.

The District Court overruled these and sustained this mode of institution of the suit in the United States District Court. Exception was taken to this ruling and error assigned (R. 23).

Demurrers to this notice of motion were then interposed and the notice of motion was amended and the demurrers were then again filed to the amended notice of motion (R. 10-11-12), and were overruled and petitioners excepted and assigned error (R. 14-15, 26-28).

PLEAS OF BANKRUPTCY.

Pleas in bankruptcy were then filed by J. P. Donnally, P. B. and H. W. Porter, C. L. Perkins, and W. Worth Smith, Jr. (R. 17).

PLEAS OF GENERAL ISSUE.

Petitioners pleaded the general issue and filed grounds of defense, U. M. Gentry's Administrator, relying in addition on insanity of his intestate (R. 3-4, 15-19).

The grounds of defense were: (1) Petitioners denied that they had purchased or subscribed, either individually or jointly, for the 230 shares of capital stock of the Bank of Louisa as mentioned in the notice of motion; (2) denied that they had entered into any special combination for the purpose of buying said shares of stock for profit; (3) admitted that each of them had purchased for himself one-eleventh part of the 230 shares of the capital stock of the Bank and stated that the interest of each of them therein was to that extent only; (4) each of the petitioners denied that he was a joint owner thereof and denied that each of them was liable for the payment of the whole amount of the assessment alleged to have been made on the 230 shares of stock (R. 14-16).

PROCEEDINGS AT TRIAL.

At the trial, on April 25, 1935, U. M. Gentry's Administrator moved that the case be continued as to him by reason of his having filed a plea of insanity on the part of his decedent at the time of the alleged transaction. Petitioners objected to this continuance on the ground that the alleged suit was joint against eleven defendants, and only a joint judgment could be entered binding upon all. This motion was overruled and an exception was noted and assigned as error (R. 21).

Upon the trial petitioners objected to the admission of certain evidence and exceptions were noted and error assigned (R. 23-33, 34, 39-41, 44, 46).

At the conclusion of respondent's evidence, petitioners moved for a directed verdict in their favor on the grounds

that the evidence showed that each of them had purchased and were owners individually on only one-eleventh interest in the 220 shares of stock and that it had not been shown that they had formed a special combination or a joint adventure or partnership for profit or that each was jointly liable for the payment of the whole of this alleged assessment on the 220 shares. This motion was overruled and exception noted and error assigned (R. 39).

Petitioners then introduced their evidence and at the conclusion of all the evidence again moved for a directed verdict in their favor on the same grounds, which was overruled and exception noted and error assigned (R. 57-63).

Respondent who has also previously moved for a directed verdict and had then withdrawn it until after the Court had announced it would overrule petitioners' motions, then again moved for a directed verdict in his favor, which motion was granted and exception was noted and error assigned (R. 50-58).

The jury thereupon rendered the following verdict:

> "We, the jury, at the direction of the Court, find in favor of the plaintiff against the defendants W. R. Dunkum, Thomas S. Winston, W. Earl Crank, Waller Holladay, and L. P. Chisholm, in the amount of $22,000.00 (Twenty-two thousand dollars) together with interest from January 22nd, 1934, until paid" (R. 23, 63).

Petitioners thereupon moved to set aside the verdict of the jury and grant a new trial on grounds specifically stated, which motion was overruled and the Court entered judgment on the verdict, and exception was noted and error assigned (R. 22-26, 63).

ASSIGNMENTS OF ERROR.

Petitioners thereupon filed their assignments of error

(R. 26-28) and filed their bills of exception within the time prescribed by law (R. 28, 64).

An appeal was thereupon allowed to the Circuit Court of Appeals of the United States for the Fourth Circuit which, on January 6, 1936, after hearing it, affirmed the judgment of the District Court with costs (R. 61).

I

The District Court of the United States was wholly without jurisdiction to maintain the proceeding by a notice of motion issued solely by respondent, through his attorney, and to enter judgment thereon against petitioners under the Conformity Act, section 914, Revised Statutes of the United States,—since the cause of action sought to be asserted in the instant case was one brought in a Federal Court on a "new cause" of action arising solely under the laws of the United States to recover a double assessment levied in December, 1933, by the Comptroller of the Currency of the United States on certain shares of stock issued in 1930 by the First National Bank of Louisa, Virginia,—a purely Federal Statutory liability imposed solely under and by virtue of Title 12, U. S. C. A., sections 63 and 64, and since there was no "like cause" existing for such double assessment on shares of stock of insolvent national banks under the courts of the State of Virginia.

The holding of the Circuit Court of Appeals affirming the decision of the District Court, therefore, is in conflict with the decision of this court in Coffey v. U. S., 117 U. S. 233, 6 S. Ct. 717, 29 L. Ed. 890 at 891, where passing directly on this question, it was held:

> "Section 914 prescribes a conformity to the practice in the court of the State only 'as near as may be' and only 'in like causes.' 'Section 914 of the United

States Revised Statutes (Comp. St. 1916, section 1537) has no application to the case, as it relates to conformity in practice and pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty, to the practice, pleading, and forms and modes or proceeding existing at the time 'in like cause' in the courts of record of the State. There is and can be no 'like causes' in the State Courts, for the action here is one within the exclusive jurisdiction of the Federal Court, and is a new and wholly statutory procedure."

So it is in the instant case, where the proceeding by notice of motion was wholly unauthorized by a rule of the U. S. District Court (Rule 14 printed in appendix), or the Conformity Act, section 914, which expressly prescribed a conformity to the practice in the courts of the State only "as near as may be," and only "in like causes," and there can be no "like causes" in the State Court, for the action here is a new cause created by the Federal Statute, Title 12, U. S. C. A., sections 63 and 64, and is one within the exclusive jurisdiction of the Federal Court, and section 911, Revised Statutes of the United States, required that the suit should be begun in the District Court of the United States "by a writ or process" issued from the Court under the seal of the Court signed by the clerk, and to bear the teste of the District Judge, "and is not authorized to be begun or issued by respondent by his counsel," and that section has not been followed in the instant case, and the United States District Court is without jurisdiction to entertain the proceeding. Dwight v. Merritt, 4 Fed. 614. Etna Insurance Company v. Hallock (Etna Insurance Company v. Doe), 6 Wallace 556, 18 L. Ed. 948; Middleton Paper Company v. Rock River Paper Company, 19 Fed. 252.

In the recent case of United States, to use, etc. v. Boat

Harbor Marine Ry. Company, Inc., et al (D. Ct. E. D. of Virginia), 58 Fed. (2d) 366, the Court there held "that the Conformity Act applied to all civil causes, other than equity and admiralty causes, which would include all proceedings at law in the District Court, except for the fact that the later part of the act limits the recommendation to Conformity to the practice, pleading and forms, and modes of proceedings in "like causes" in the courts of record in the State", and said:

> "It has been held, and it would seem proper, that a cause of action arising under a Federal Statute over which the Federal Courts are given jurisdiction, as they are in cases like the instant one, is not a 'like cause' in a Federal Court within the meaning of the Conformity Act."

In U. S. v. Moore (D. E. C. D. N. Y. 1923), 287 Fed. 879, the Court at page 883 said:

> ". . . and it would seem that by the use of the words 'like causes' it was intended to eliminate proceedings in bankruptcy and contempts in such proceedings from the operation of the statute of conformity, as there are no such 'like causes' as bankruptcy of which the state courts have jurisdiction, and therefore there could be no practice or procedure in state courts in 'like causes' to which the federal courts could conform."

This case was appealed to the Circuit Court of Appeals and affirmed, 294 Fed. 852, and a Writ of Certiorari was denied by this Court, 34 S. Ct. 331, 68 L. Ed. 860.

In U. S. v. Fifty Boxes, etc., of Lace (D. C. N. Y.), 92 Fed. 601, the Court held that the Conformity Act did not apply to the manner of executing commissions for taking depositions in revenue cases and cited U. S. v. Coffey, *supra*, as authority for that holding.

In the U. S. v. Southern Dredging Company (D. C., Del.), 251 Fed. 400, where the Federal Statutes provided that a surety company should appoint a statutory agent to accept service of process, and service was left at the statutory agent's house in the presence of his wife, the Court said:

> "There is and can be no 'like causes' in the State Courts, for the action here is one within the exclusive jurisdiction of the Federal Court, and is a new and a wholly statutory procedure."

This is clearly true in the instant case. The action sought to be asserted by the notice of motion is a new and an exclusive statutory Federal "cause of action" to recover for an assessment levied in 1934 by the Comptroller of the United States on the shares of stock of an insolvent national bank, of which the Federal Court had exclusive jurisdiction under Title 12, U. S. C. A., sections 63 and 64, providing for such a double assessment, and which "cause" of action was wholly unknown to the common law, and to the State practice, pleading, and forms, and modes of proceeding in the Virginia Court. There was and could be no "like cause" therefore, in the courts of record in that State; and the instant case is not a "like cause" within the meaning of the Conformity Act, as defined in the authorities cited *supra,* and the proceeding had to be under section 911 of the Revised Statutes of the United States.

The District Court of the United States was, therefore, clearly without jurisdiction to maintain the proceeding by a notice of motion which was begun and issued by the respondent by his attorneys, and was not under the seal of the District Court, signed by the Clerk, and did not bear the teste of the District Judge, as was required by section 911 of the Revised Statutes of the U. S.

The Circuit Court of Appeals in its decision (Op. R.

72), in affirming the judgment of the District Court, has, therefore, rendered a decision against petitioners in conflict with the decisions of this Court and with the applicable decisions of other Circuit Courts of Appeals of the United States, and has misconstrued and misapplied Title 12, U. S. C. A., sections 63 and 64 and sections 911 and 914 of the Revised Statutes of the United States.

The proceeding in the instant case by notice of motion issued by and signed by respondent by his counsel to enforce a cause of action arising under the Federal Statutes, Title 12, U. S. C. A., sections 63 and 64, over which the Federal Courts are given exclusive jurisdiction, is not a "like cause of action" within the meaning of the Conformity Act, or by State Statutes as to proceedings by notice of motion thereon.

II

The District Court was also without jurisdiction to maintain this suit under Title 12, U. S. C. A., sections 63 and 64 under which the shareholders of National Banking Associations are made individually responsible, and not one for another, and only to the extent of the amount invested by each in the stock thereof, at the par value thereof in addition to the amount invested in such shares of stock by each of them individually, since a joint action cannot lie under this Statute on a several liability and since this is a suit in a Federal Court upon an individual cause of action created by a Federal Statute, and since the Conformity Act has no application to the cause of action sought to be asserted in the United States District Court in this case.

On this point the District Court during the trial (R. 34), and in its opinion (R. 61), found (R. 34-35, 37, 39-40, 43, 46, 47, 48, 51, 53, 54, 55, 56), that each of the Petitioners merely had an undivided one-eleventh interest

in the entire block of 220 shares, and that the contract and purchase of each of them was for only one-eleventh and since the Circuit Court of Appeals for the Fourth Circuit likewise found that "each had a one-eleventh interest in the enterprise."

It is thus obvious that the Circuit Court of Appeals failed to consider the Federal Statutes in connection with the fact that the contract made by petitioners and other defendants was to purchase only "one-eleventh" of the 220 shares of stock in the block (R. 74), as found by both (R. 61), and likewise failed to consider section 5220 of the Revised Statutes of the United States which confines the liability of the shareholders provided for by section 5151, U. S. R. S., to an "individual liability," and says it "may be enforced" by the receiver of any insolvent national bank.

The authority of the receiver of such insolvent national bank is purely statutory, and is limited to the powers expressly granted or necessarily implied from the language of the above statutes. First National Bank of St. Louis v. State of Missouri, etc., 263 U. S. 640, 659, 44 Sup. Ct. R. 213, 215, 216, where this Court said:

> "Moreover, the reasons adduced against the existence of the power substantively are conclusive against its existence incidentally; for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld, nor to enlarge powers given; but only to carry into effect those which are granted."

III

The Federal Courts have repeatedly held that a notice of motion issued and signed solely by a plaintiff for the

purpose of instituting an action at law in a District Court of the United States, was a process within the meaning of Revised Statutes of the United States, Section 911 (Title 28, U. S. C. A., Section 721), and to be valid it had to be under the seal of the District Court, signed by the clerk, and bear the teste of the District Judge.

The action in the instant case was begun by a notice of motion for a personal judgment for money. It was not under the seal of the District Court, nor signed by the clerk, and did not bear teste of the District Judge (R. 1-2). The District Court was without jurisdiction to entertain such action under Title 28, U. S. C. A., Section 721, and the United States Marshal was likewise without authority to serve such notice of motion under Title 28, U. S. C. A., Section 503. The District Court never acquired jurisdiction at all of the suit because there was no valid service of a valid process. The decision of the Circuit Court of Appeals affirming such judgment is erroneous and in disregard and in violation of such statutes and in conflict with the decisions of other Circuit Courts of Appeal and the weight of authority and has created a conflict in the Federal decisions on this important matter of Federal law, and involves a Federal question under the laws of the United States.

The whole proceeding was contrary to Title 28, U. S. C. A., Section 721, which provides:

> "All writs and processes issuing from the Courts of the United States shall be under seal of the Court from which they issue, and shall be signed by the clerk thereof."

Thus in 1 Rose's Code of Fed. Proc., § 901, it is said:

> "Federal Courts derive their power to issue from the common-law writs from R. S., Section 911. The form and general style of Federal writs are also prescribed by Congress. So that the conformity re-

quirement of R. S., Section 914 has little or no application to Federal writs. The conformity law applies, however, to process in common-law causes, except as regards form and style, which Congress has prescribed, and as respects service, it being provided that Federal process shall be served by the marshal. These requirements as to form and service forbid adoption in the Federal Courts of the New York and Wisconsin practice in so far as it permits plaintiffs' attorney to issue and serve the summons."

The decision of the Circuit Court of Appeals is also in direct conflict with Peaslee v. Haberstro, Fed. Cas. No. 10,884, where the Court held:

"The motion to set aside the summons must be granted upon the ground that the summons was not signed by the clerk or under the seal of the court. Section 911 of R. S. of U. S. prescribed that 'all writs and processes issuing from the Court of the United States shall be under seal of the Court from which they issue and shall be signed by the clerk thereof.' This provision is not inconsistent with and, therefore, is not repealed by the subsequent Act of Congress (Act of June 1, 1872, Section 5, 17 Stat. 197) now embodied in Section 914 of R. S. which enacts that 'the practice, etc. . . . (Conformity Act). Giving due effect to the latter act, the practice and forms and mode of proceeding in Courts of the United States in Common law actions is to conform to and be regulated by that of the State Courts when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the statutes of the United States are silent, the practice of the State Courts will prevail, but when those statutes speak they are controlling. If the summons in this case had been signed by the clerk, it could be amended as regards the seal. As it is there is no summons in the nature of process known to this Court. The summons is set aside."

So for the same reasons the summons issued by and signed by the plaintiff in the instant case should have been set aside.

In Dwight v. Merrit (Cir. Ct. S. D. N. Y.), 4 Fed. 614, a motion to set aside a summons under New York practice, Blatchford, Circuit Judge, said:

> "In this case an attempt has been made to commence a suit at common law in this Court by serving on the defendant a paper purporting to be a summons in the form presented by the statute of New York for commencing a civil action. It is signed by the plaintiffs' attorney, but is not under seal of the Court. . . . A summons, or notice to the defendant for the commencement of a suit is certainly process, quite as much as a capias or a subpoena to appear and answer is process. The statute intends that all process shall issue from the Court, where such process is to be held to be the action of the Court, and that the evidence that it issues from the Court and is the action of the Court shall be the seal of the Court and the signature of the clerk. It is clear that a signature by the plaintiffs' attorney without a seal and an issuing from the office of such attorney cannot be submitted. There is nothing in the provisions of Section 914 which abrogates the provisions of Section 911. The two must be so construed as to stand together. Peaslee v. Haberstro, 15 Blatch. 472. The principle of that decision has been generally adopted in applying Section 914 to the practice of the Federal Courts in suits at common law. That principle is that where Congress has by statute pointed out a specific course of procedure, or has legislated, generally upon the subject matter embraced or involved by the proceedings sought to be pursued, such legislation must be followed, although opposed to the forms and modes of proceeding prevailing in the state Courts and established by state statutes. Defect not amendable."

In Johnson v. Healy, Fed. Cas. No. 7389, it was also said:

"In the case of Martin v. Criscuola, 10 Blatchf. 211, Fed. Cas. No. 9159, it was held that a summons not issued by a Court, but merely issued by the plaintiffs' attorney, was not a proper summons. That decision, on the view that the summons is process and must, under the statutes of the United States, and notwithstanding the provisions of the Act of 1872 and of Section 914 of R. S., be issued by the Court and have the authentication of the Court."

In U. S. v. Mitchell, 223 Fed. 805 (E. D. N. Y.), the Court, distinguished between form of process and manner of service, said:

"Federal legislation must, of course, be followed, although opposed to the practice and procedure of the state Courts. U. S. Rev. St. Section 911 (Comp. St. 1913, Section 1534). Accordingly it has been held that an action may not be commenced in the Federal Courts by a summons issued in the name of the plaintiff's attorney pursuant to the mode of commencing actions in the Courts of the State of New York. Martin v. Criscuola, 10 Blatchf. 211, Fed. Cas. No. 9,159; Peaslee v. Haberstro, 15 Blatchf. 472, Fed. Cas. No. 10,884; Dwight v. Merrit (C. C.), Fed. 614."

In Middleton Paper Co. v. Rock Paper Co., 19 Fed. 252, it was said:

"Under the state law in this state and in New York and some other states, the plaintiff's attorney issues the summons, which is the commencement of a suit, but I believe it has been uniformly held, in view of the provisions of Congress, that this cannot be done in the Federal Courts. . . ."

"And the summons served upon him (the garnishee) is the 'process' by which the court is to get jurisdiction of the action, if it gets it at all. It comes within any

definition of process with which the court is acquainted. The summons, notice, writ or whatever it may be called, by virtue of which a defendant is required to come into court and answer, litigate his rights, and submit to the personal judgment of the court, must be 'process within the meaning of the law of congress' and the rule of the court, which is to be issued by the clerk of this court, under seal of the court and tested in the name of the chief justice of the United States."

In re Condemnation Suits, 234 Fed. 443 (E. D. Tenn.) Sanford, Judge, said:

"I think it entirely clear, both upon principle and under the authorities, that in any original suit in a Federal Court which must be commenced by a summons or other process of the Court itself, such process must be signed by the clerk and issued under seal of the Court to be valid, regardless of any different provision as to the form of a summons in the state Courts, the general conformity statutes not operating to waive this specific requirement as to the process in the Federal Courts embodied in Section 911 of the Rev. Statutes (citing cases)."

In Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931, 932, Mr. Justice Miller, delivering the opinion of this Court, distinguished and determined the manner of exercise of different sorts of jurisdiction thus:

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the process of the cause.

"Jurisdiction of the res is obtained by the seizure under process of the Court, whereby it is held to abide such order as the Court may make concerning it."

In Boswell v. Otis, 9 How. 336, 13 L. Ed. 164, this Court again said:

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the Court."

Jurisdiction was not acquired in either of the two modes in the instant case.

In Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, 570, this Court again distinguished the use of substituted service by notice in an *in rem* proceeding from process which is required to give jurisdiction against the person.

In the case at bar the District Court was called upon to exercise a jurisdiction "against the person," and under the above Federal Statute and decisions, jurisdiction could only be acquired by a process issued by the District Court, signed by the clerk, and bearing the teste of the Judge. (U. S. C. A., Title 28, Section 721). "Lex ita est". Where Congress has specified a procedure it must be followed.

NOTICE OF MOTION IS PROCESS.

The Circuit Court of Appeals held that the notice of motion for judgment in the instant case was under the Virginia statute a proper method of procedure to obtain a personal money judgment against petitioners in the United States District Court (R. 72).

This holding is in direct conflict with Title 28, U. S. C. A., Sections 721 and 503, and with the decisions of other Circuit Courts of Appeal, and the weight of authority pointed out *supra*. This conflict in the Federal decisions should be settled by this Court.

Hughes Fed. Proc. 2nd Ed., Section 137, referring to Title 28, U. S. C. A., Section 721, says:

"This excludes procedure by motion to recover money

common in some states when the notice is simply signed by the attorneys. . . . A motion to recover money, when authorized by state practice, can be used in the Federal Courts; but in such case the notice of motion . . . must be signed, not by the attorneys, but by the clerk, and must be under the seal of the Court."

Hughes in his 6th Edition, Section 3584, again says:

"In general the forms of such process that obtain in the State courts are adopted in the Federal Courts, except that there can be no departure from the Federal statutory requirement as to the sealing, signing and testes of writs and processes."

The notice of motion in the case at bar departed from these Federal statutory requirements, and there was no valid service of a valid process, and the judgment was void for want of jurisdiction, and the Circuit Court of Appeals for the Fourth Circuit erred in not so holding. Moreover, the Supreme Court of Appeals of Virginia in Hot Springs Co. v. Schreck, 131 Va. 581, 584, referring to the proceeding of notice of motion in the State Courts said:

"We have held in a number of cases that the notice under Section 6046, takes the place of the writ and declaration. Morotock Ins. Co. v. Pankey, 91 Va. 259, 21 S. E. 487; Security Loan Co. v. Fields, 110 Va. 827, 67 S. E. 342, and cases cited."

This holding by the highest Court of the States as to the notice of motion taking the place of the writ and declaration . . . a process under the Virginia statute—should have been regarded as binding upon the United States District Court and the Circuit Court of Appeals in the instant case. The notice of motion is clearly with-

in Section 911, R. S., which declares that the exercise of the judicial power of the United States shall be by a paper signed, and authenticated by its officers. The decision of the Circuit Court of Appeals for the Fourth Circuit in the instant case, as well as its former decision in Ely v. Gamble, 75 Fed. (2nd) 171, is erroneous and in conflict with the decisions of other Circuit Courts of Appeal on the same matter, and in conflict with the great weight of authority, and with the U. S. Revised Statute, Section 911. These important Federal questions should be settled by this Court.

IV

Moreover, the only provision in the Federal law for service of process in a "personal action to recover a money judgment" in the United States Courts is U. S. Code, Title 28, Section 503. It provides:

> "It shall be the duty of the marshal of each district to attend to the District Courts when sitting therein, and to execute, throughout the District, all lawful process directed to him, and issued under the authority of the United States. (R. S. Section 787.)"

The United States marshal, therefore, had no authority to serve the notice of motion in the instant case under Section 503, Title 28, U. S. C. A. *supra*, and the final judgment and decision of the District Court in the instant case was a nullity and void for entire want of jurisdiction to entertain such action.

Since the double liability of the Stockholders is a Federal cause of action and there is no like cause in the State Court, the District Court is without jurisdiction to try the case instituted by a notice of motion. Since the notice of motion is process it must be issued under the seal of the Court and bear the teste of the Judge. The notice

of motion in this case was merely signed and issued by respondent and did not give the Court jurisdiction to try this case. The attempted institution of this suit by a notice of motion being void, the District Court had no jurisdiction to enter a judgment against these Petitioners, and it is submitted the judgment of that Court and of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

MINITREE JONES FULTON,
HOMAN W. WALSH,
LYTTELTON WADDELL,
Counsel for Petitioners.

APPENDIX.

Rules of the District Court of the United States for the Eastern District of Virginia

January 1928.

Adoption of State Practice.

The rules of practice and pleading and the forms and modes of proceeding, including the laws relating to judgments, attachments, and executions prescribed by the Code of Virginia for the government of the common-law courts of the State, and the acts passed or to be passed amendatory thereto or any rules of practice made by authority thereof, shall govern this court on the common-law side, except where they conflict with the Constitution or laws of the United States. This shall include motions, provided they conform to Section 911, United States Revised Statutes, and supplementary proceedings, which latter may be had before a United States commissioner.